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Supreme Court of the United States

OCTOBER TERM, 1948

No. 232

ALLEN T. SIMMONS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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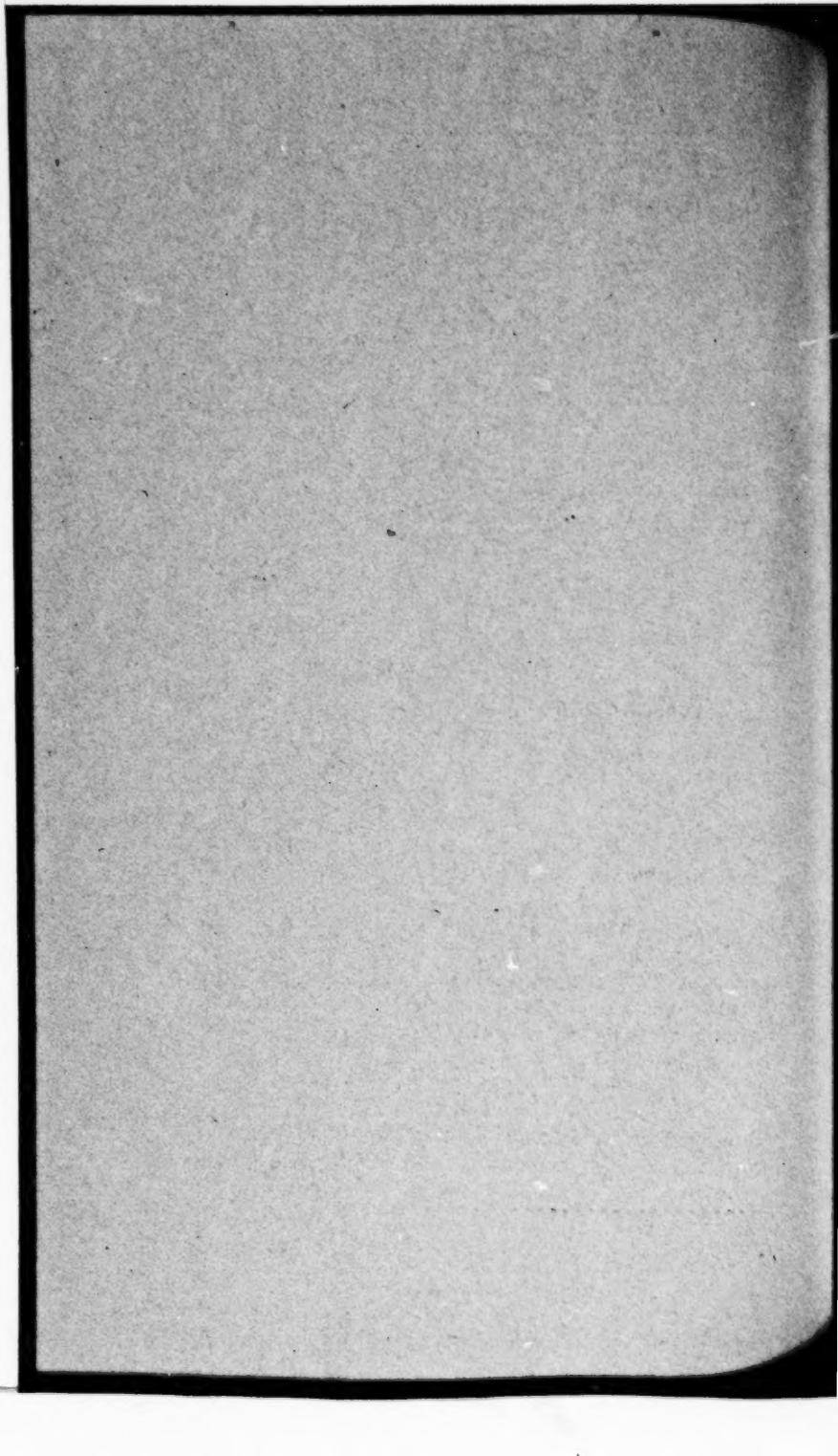

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a petition for a writ of certiorari to review a decision and order of the United States Court of Appeals for the District of Columbia of May 24, 1948 (by a panel

of three judges), dismissing an appeal from a decision of the Federal Communications Commission denying the petitioner's application for a permit to improve the facilities of his radiobroadcasting station, and granting a conflicting and mutually-exclusive such application of another.

B.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 23, 1925, and Section 402(e) of the Communications Act of 1934.

C.

QUESTIONS PRESENTED.

1. Under the First Amendment to the Constitution and under Section 326 of the Communications Act of 1934 (prohibiting censorship), may the Federal Communications Commission deny an application for a radiobroadcasting license on the sole ground that the applicant intends that substantially all his programs during the most-desirable hours of the day shall be of network origin, the high quality of such programs being conceded?

2. May the Federal Communications Commission, after having given the parties notice of a general hearing to compare all aspects of two mutually-exclusive applications for the same radiobroadcasting facility (as required by the decision of this Court in *Ashbacker Radio Corporation* vs. *Federal Communications Commission*, 326 U. S. 327), then convert the hearing into separate *ex parte* proceedings through a decision which denies one upon the basis of its expected program structure and grants the other upon a non-comparative basis?

D.

MATERIAL FACTS AND PROCEEDINGS BEFORE THE FEDERAL COMMUNICATIONS COMMISSION AND THE COURT BELOW.

The petitioner is licensee of radiobroadcasting station WADC at Akron, Ohio. The other party to the proceeding before the Federal Communications Commission was WGAR Broadcasting Company, licensee of WGAR at Cleveland. The petitioner has been assigned the frequency 1350 kc., WGAR, 1220 kc. At the outset of the present proceedings, each party was permitted to use five thousand watts power. It had then become apparent that the frequency 1220 kc. would permit the use of fifty thousand watts power, whereas 1350 kc. was a frequency at which five thousand watts would remain the maximum. By the applications before the Commission:

1) WGAR requested permission to increase its power to fifty thousand watts, and

2) The petitioner requested an exchange of frequencies with WGAR so as to assign the latter 1350 kc. with five thousand watts while his own station, WADC, would operate at 1220 kc. with fifty thousand watts (R., p. 122).

Either frequency with five thousand watts at the Cleveland location would provide adequate service to Cleveland; the change in frequency of WGAR from 1220 kc. to 1350 kc., as proposed by the petitioner, would not measurably reduce its coverage. The only relevant difference between the frequencies was in the matter of permitting the higher power (R., pp. 125-126). The applicant receiving the fifty-thousand-watt authorization would have a much more extended coverage, including large rural areas surrounding Cleveland (R., p. 125).

Upon consideration of the two applications, the Federal Communications Commission on February 1, 1946, desig-

nated both of them for joint and comparative hearing (R., pp. 11-14). On February 18, it served upon both parties formal notices of the issues upon which the alleged comparative hearing was to be held. In the instance of the petitioner, the Commission proposed to determine his qualifications, the expected coverage, the type and character of program service as regards its suitability to meet the requirements of the area to be served, whether or not there would be interference, the suitability of the equipment, the requirements of the Civil Aeronautics Administration, and "to determine on a comparative basis which, if either, of the applications in this consolidated proceeding should be granted". The issues specified for the WGAR application were substantially similar (R., pp. 11-14).

Shortly after the publication of the notices of hearing and on March 7, 1946, the Commission, without regard to any pending application and in connection with no hearing, published a document entitled "Public Service Responsibility of Broadcast Licensees" (U. S. Government Printing Office).

This is an intensive and long discussion of the Commission's concern with the program service of the radiobroadcasting stations of the United States, and a detailed evaluation of some of the trends in taste, content and classification of the programs of many stations.

More importantly the Commission's publication announced the policies which the Commission would enforce in the granting of licenses and renewals of licenses. It specifically published the Commission's standards of programming with regard to requirements for the carrying of sustaining programs, requirements for the carrying of local live programs, requirements for the discussion of public issues, and prohibition of advertising excesses. The report also published the procedural methods by which the Commission in future would insure compliance with its requirements in the four aspects indicated.

After the publication of this report, the petitioner on April 7th filed an amendment to his pending application by which he substituted for the program description (which is required by the Commission for such applications), a new one. The substituted program description recited "applicant proposes to operate as Columbia outlet for Akron and Cleveland, providing complete service of Columbia commercial and sustaining programs, plus augmented programs of local origin, to serve the proposed coverage area" (R., pp. 24-25).

April 12th, the petitioner filed a supplemental amendment showing percentage-wise the breakdown of the various program classifications (R., pp. 25-26).

A full competitive and comparative hearing (so far as the examiner was concerned) was held before an examiner of the Commission April 24th to 26th, inclusive. At that time, all aspects of engineering, of qualifications, of interference, of management, and many other details were extensively canvassed. The hearing transcript consisted of 504 typewritten pages; 91 exhibits were offered and received in evidence.

The Commission's proposed decision was handed down October 8, 1946. While it contained a discussion of the evidence, it proposed to deny the petitioner's application on one feature alone. It pointed out that on a comparative basis, there were two factors tending to favor a grant of the petitioner's application. The first of these was the local residence of the petitioner as against the non-residence of the controlling interests of WGAR. The second was the overlapping of service areas of WGAR and of WJR, located at Detroit, and which is under common control with WGAR. After discussing these considerations the Commission stated that it felt that these advantages on behalf of the petitioner were outweighed by a disadvantage, namely, that WDAC "proposes merely to become a conduit for the network programs of the Columbia Broadcasting System for the entire day after 8:00 a. m." (R., pp. 82-102).

To this proposed decision the petitioner filed his exceptions on October 28, 1946. The principal exception was "to any consideration by the Commission of the nature, character or content of the present or proposed programs of either applicant." Exception was also taken to the censorship implied and to the failure of the Commission to consider all available program service to the Cleveland area as a unity, arguing that the public was served through a number of different programs at any one time, rather than by confining the listener to the service from one individual station. These exceptions were accompanied by a brief (R., pp. 102-115).

Oral argument was held November 20, 1946. The Commission's final decision was handed down April 27th, 1947 (R., pp. 120-146).

In the final decision, the Commission departed from the comparative consideration of the two applications which had been given in the proposed decision, although a number of the findings of fact were carried over. The findings of fact, however were merely set up mechanically and were not in general relied upon for the Commission's conclusions and order. The final paragraph of the order says that if, for any reason, the Commission can deny the application of the petitioner, "no comparative consideration of the relative merits of the two conflicting and mutually-exclusive applications is required." The comparative consideration was refused the petitioner upon one ground only, namely, that "if this application for an increase in power is granted, it [WADC], intends to inaugurate a new program policy and . . . under this program policy, it will carry all the commercial and sustaining programs, without exception, offered by the network during the broadcast day."

Having thus disqualified the petitioner's application from consideration, the Commission held that "no comparative consideration of the relative merits of the two conflicting and mutually-exclusive applications is required" and

granted the application of WGAR Broadcasting Company on an *ex parte* basis (R., p. 145).

There was an unsuccessful petition for rehearing (R., pp. 146-160).

An appeal was taken to the United States Court of Appeals for the District of Columbia on July 21, 1947 (R., pp. 2-6). The petitioner's principal contention was that an out-of-hand denial of his application upon a prior textual evaluation of his proposed program content amounted to censorship, in violation of Section 326 of the Communications Act of 1934 (reprinted in the Appendix). He also contended that he had been deprived of the comparative hearing to which he was entitled and which had been provided for by the Commission's original notices of hearing.

The appeal was taken both under Section 402(b)(1) of the Act from the denial of the petitioner's application and under Section 402(b)(2) from the grant of the application of WGAR Broadcasting Company. (Both sections are reprinted in the Appendix.)

The case was argued before a panel of three, Justices Edgerton, Clark and Miller. The opinion of the Court has not yet been officially reported (R., pp. 162-165).

The majority of the Court, through Justice Edgerton held that the action of the Commission in refusing to consider the petitioner's application did not constitute censorship, on the authority of *National Broadcasting Company* v. *United States*, 319 U. S. 190.

To distinguish the Commission's action from censorship as the Court understood it, the Court quoted with approval the reasoning of the Commission as set forth in the latter's opinion:

> The application of WADC thus raises squarely the issue of whether the public interest, convenience and necessity would be served by a station which during by far the largest and most important part of the broadcast day "plugs" into the network line and, thereafter, acts as a mere relay station of program

material piped in from outside the community. We are of the opinion that such a program policy which makes no effort whatsoever to tailor the programs offered by the national network organization to the particular needs of the community served by the radio station does not meet the public service responsibilities of a radio broadcast licensee. We do not mean to indicate that the daily program service of the Columbia Broadcasting System or any other network does not include many programs of a high calibre, and it may even be that the applicant's proposed policy of carrying all Columbia programs, commercial or sustaining, might result in making available to its listening audience for the first time certain valuable programs of a sustaining nature, or concerning some vital public issue, which would otherwise be eliminated in favor of some local commercial program. But applicant's proposed program policy is not only tantamount to a voluntary abdication to the network of the duty and responsibility of a broadcast station licensee to determine for itself the nature and character of a program service which will best meet the needs of listeners in its area, but is an abdication to an organization which makes no pretense to scheduling its programs with the particular needs and desires of any one service area in mind. A national network affiliation can be of great assistance to a particular station's service to its listeners as the source of a quantity of high calibre programs of general interest not otherwise available locally, to supplement, rather than to supersede, the locally originated programs of the station. It is not equipped, however, to take over the entire programming of any station; even the stations which are wholly owned by the national networks maintain extensive local program staffs which integrate the network's service into a daily program best calculated to serve local interests. And the same considerations of public policy which led us, in our Chain Broadcast Regulations, upheld by the Supreme Court in National Broadcasting Company *v.* United States, 319 U. S. 190, to make it impossible for a network to restrict the opportunity of one of its affiliates to substitute programs of local interest and derivation whenever the

station determined that such programs would best serve the interests of its particular audience, lead us to conclude, here, that the voluntary adoption of a similar policy by a licensee cannot serve the public interest. In either case the local interests of the listening community are needlessly sacrificed . . . (R., p. 163).

Mr. Justice Miller filed a separate opinion denominated "concurring". He "concurred" because he felt the petitioner's application should have been denied upon the ground that the petitioner was requesting a frequency already in use. This appears to be a misapprehension of the theory on which the cases were before the Commission, inasmuch as all parties were in agreement that the Commission, on the pleadings, could lawfully require WGAR to change frequency from 1220 kc. to 1350 kc. without loss of coverage. Otherwise, the opinion of Justice Miller is in effect a dissenting one. It was his view that what was done by the Commission amounted to censorship as prohibited by the Act. He said:

> Instead of rejecting Simmons' application upon that obvious ground, the Commission chose to do so because Simmons had said he proposed, if the license were granted to him to use almost exclusively the programs of the Columbia Broadcasting System. This would not be in the public interest, the Commission said, and would amount to an abdication of the prospective licensee's right and power to select the programs for his broadcasts. I consider it, on the contrary, to be an exercise of the right of choice.
>
> Simmons had not bound himself by contract with Columbia to use its programs as extensively as he said he proposed to do. Nothing would prevent him from interrupting that use at will, and interjecting programs of local origin and interest whenever he saw fit, unless the Commission itself should require him to adhere completely to his expressed intention.
>
> Denial of a license because the applicant expects to make large use of the facilities of one of the major

broadcasting companies of the country, saying that such use will not be in the public interest, seems an arbitrary and capricious exercise of power not granted by statute, but expressly forbidden by it. It is not a finding based on evidence. Nor is it justified by the claim that in the public interest the Commission may require a balance between national and local material to be maintained by *every* station. The demands of his listeners, of which a licensee is keenly aware, will require that balance. The idea is especially untenable and groundless when, as in this case, the proposed station is in a metropolitan area already served by some fifteen other stations which devote time to the broadcasting of programs which have only a local interest.

To uphold the Commission's order because the applicant expressed an intention to make extensive use of Columbia's programs is to grant to the Commission the power of censorship, which is expressly forbidden by the Act. "Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred." (*Hannegan, Postmaster General* v. *Esquire, Inc.*, 327 U. S. 146, 151 (1946). Certainly the power of censorship should not be granted by a court when it has been withheld by the Congress. (R., pp.164-165).

E.

REASONS FOR GRANTING THE WRIT.

1) The Court below approved an act of censorship by the Commission, in violation of Section 326 of the Communications Act of 1934.

The important feature of the action of the Commission was that the Commission denied the petitioner's application on an absolute, not on a comparative basis. The application would have been denied if it were the only application pending. It was denied because of the prediction of the petitioner that his proposed programs would contain the full available schedule of the Columbia Broadcasting System. The Commission finds as a fact that the programs

are "good" programs (R., pp. 138-139), thus excluding any adverse view of the petitioner's program-making characteristics such as was the basis for the decisions in *KFKB Broadcasting Company* v. *Federal Radio Commission,* 60 App. D. C. 79 and *Trinity Methodist Church, South* v. *Federal Radio Commission,* 61 App. D. C. 311. The action of the Commission is a declaration that in this case and henceforth, regardless of all other considerations, technical, financial, of character or otherwise, the Commission will reject the application of any person who proposes to broadcast a full network schedule of programs.

This is censorship in the broadest form. It is a much-stronger instance of censorship than the advance elimination of phrases or texts. It is the proscription of a type of program structure in itself unobjectionable.

It does not help the Commission's view to argue as to the reasons for which it believes such proscription justifiable. The statute does not stop at prohibiting unjustifiable censorship. Apt here is the statement in Mr. Justice Frankfurter's dissent in *Winters* v. *People of New York,* U. S. , , 68 S. Ct. 665, 676, "Wholly neutral futilities, of course, come under the protection of free speech as fully as do Keats' poems or Donne's sermons."

It is for this reason that the Commission's action can not be justified by the claim that what the Commission is seeking is a "program schedule properly balanced[1] . . ." (R., p. 140).

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[1] The following is from the diary of Dr. Joseph Goebbels for May 22, 1943:

> "I had a sharp conflict with Cerff about the present program of our broadcasting system. Cerff takes a somewhat super-national-socialistic attitude. If he had his way music, for instance, would be made only on lyres. You can't operate a radio service for the masses that way. Broadcasts must have diversified and manifold programs . . ."

The Goebbels Diaries, Doubleday & Company, Inc., Garden City, 1948, p. 390.

Any attempt by the Commission to satisfy its own concept of a balanced program structure by advance prescription is censorship.

Equally unavailing is the plea by way of justification, that the petitioner had parted with control over his programs (R., p. 139). As was pointed out by Mr. Justice Miller below, the petitioner had not abandoned his control; he was proposing to exercise it (R., p. 165). The Commission required the petitioner to make a prediction as to his programs. He performed an act of free selection and predicted a program structure. He has no contract or other commitment requiring him to accept the programs of the Columbia Broadcasting System. Were such a contract to exist, it would come within the condemnation of the Commission's regulations approved by this Court in *National Broadcasting Company* v. *United States* (1943), *supra.*

2) Even without Section 326, the Commission, under the First Amendment, may not set up a textual evaluation of radio programs as a condition precedent to the consideration of applications for licenses.

It would no doubt be conceded that if the Commission, instead of proscribing the full schedule of the Columbia Broadcasting System, had proscribed a particular social, political, economic, religious or "public affairs" point of view, the action of the Commission would have transgressed the protection of free press and free speech accorded by the First Amendment.[2]

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[2] The following is from *The American Radio, A Report on the Broadcasting Industry in the United States from The Commission on Freedom of the Press,* University of Chicago Press 1947 page, ix:

> "8. We recommend that, in order to establish radio, television, and facsimile broadcasting clearly within the meaning of the term 'press' as protected by the First Amendment, the industry appeal to the courts any actual

But there is no reason—even though there may be an historical excuse—for drawing the distinction between public affairs broadcast and general broadcasts.

The radiobroadcasting industry is primarily an entertainment industry and it derives its support from commercial advertising.

In *Mutual Film Corporation* v. *Industrial Commission of Ohio* (1915), 236 U. S. 230, this Court held that motion pictures, like "the theatre, the circus and all other shows and spectacles" are not within the protection of constitutional provisions for freedom of speech. In *Valentine* v. *Chrestensen* (1942), 316 U. S. 52, it was held that advertising matter is similarly not protected.

Putting aside Section 326 of the Communications Act, it might be argued that by combining the doctrines of the *Mutual Film* case and the *Valentine* case, radio broadcasting can be eliminated from the protection of the First Amendment.

But the position of radio broadcasting as a technique of mass communication in the modern world is far too important for such treatment.

The evils of the use of the licensing power whenever it tends to operate as a means of textual control have been fully summarized in *Lovell* v. *City of Griffin* (1938), 303 U. S. 444 and *Grosjean* v. *American Press Company* (1936), 297 U. S. 233.

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cases of interference by government with freedom of expression *on public affairs* via radio, and that the F. C. C. co-operate in making such appeals possible" (italics supplied).

It is to be noted that the Commission's concern is only as regards the field of "public affairs". This is due to the feeling of the Commission, expressed also in the Commission's special report by Professor Zechariah Chafee, Jr., *Government and Mass Communications*, that advance program prescriptions and proscriptions in other fields do not involve the First Amendment, op. cit. pp. 196-197 and note.

The protection has only recently been extended, by a divided Court, to the public use of loud speakers, *Saia* v. *People of the State of New York* (decided June 7, 1948), U. S. , 68 S. Ct. 1148.

And in *Winters* v. *People of the State of New York, supra,* the Court said (at p. 667 of the S. Ct. edition), "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."

If there be anything in either the *Mutual Film Company* case or the *Valentine* case which could operate to deprive radiobroadcasting stations of the protection of the First Amendment, the cases should, to that extent, be overruled or distinguished.

In *Federal Communications Commission* v. *Sanders Brothers Radio Station* (1940), 309 U. S. 470, 475, it was said, "The Commission is given no supervisory control of the programs, of business management or of policy".

This rule was not set aside in *National Broadcasting Company* v. *United States, supra.* In that case the Court was dealing with the validity of regulations of the Commission prohibiting the exaction by the network of firm contracts by which stations were required to broadcast network programs.

3) The Commission's consistent recent course of conduct in the field of advance textual program proscriptions makes the question of its statutory power so to do a question of general importance which has not been, but should be settled by this Court.

a) Reference has already been made, *supra,* p. 4, to the publication by the Commission on March 7, 1946, of a text-book entitled "Public Service Responsibility of Broad-

cast Licensees", giving the Commission's detailed evaluation, for licensing purposes, of various types, proportions and balances of programs and announcing licensing policies concerning them. This book is described in the literature as "The Bluebook", owing to the color of its cover.

b) Section 3.788(a) of the Rules and Regulations of the Commission provides, "A licensee of an international broadcast station shall render only an international broadcast service which will reflect the culture of this country and which will promote international goodwill, understanding and cooperation". On July 14, 1939, the Commission "suspended the operation" of this section, but it has not been repealed.

c) In *Application of Mayflower Broadcasting Corporation* (1940), 8 F. C. C. 333, 339-341, the Commission ruled that a radiobroadcasting station may not broadcast editorially the views of its owners. Recently the Commission held extensive public hearings to determine whether, and how, this rule should be modified.

d) In *In re United Broadcasting Company* (1945), 10 F. C. C. 515, the Commission held that a licensee may not enforce a policy of excluding paid broadcasts on controversial matters and of restricting such broadcasts to "free" time.

e) In *In re Petition of Robert Harold Scott* (1946), 3 Pike and Fischer, Radio Regulations,[3] p. 259, the Commission held that stations must make time available for temperate arguments in support of the atheistic point of view.

f) In *In re Petition of Homer P. Rainey* (1947), 3 R. R. 737, the Commission held that notwithstanding Section 315 of the Act disclaims any obligation on any station to permit political broadcasting, the Commission would not permit a station to adopt a rule of practice limiting the amount

[3] Hereafter cited as "R. R."

of time allocated each candidate in a primary election to the times and extent involved in that instance.

g) In *Application of Capital Broadcasting Company* (1947), 4 R. R. 21, the Commission held that it is no bar to the renewal of a license that the station broadcasts horse-race results, provided that the information is not so detailed as to be "of particular interest to those who wager on the races" or so urgent as to interrupt other programs.

h) In *Application of Port Huron Broadcasting Company* (1948), 4 R. R. 1, the Commission held that a licensee may not edit or reject a political address because it contains libelous matter.

4) The refusal of the Commission to give the two competing applications comparative consideration and the action of the Court below in dismissing the petitioner's appeal combine to deprive the petitioner of the fair hearing to which he was entitled under the doctrine of Ashbacker Radio Corporation v. Federal Communications Commission, 326 U. S. 327 and nullify the provisions of Section 402(b)(2) of the Act according an appeal from a grant to another.

The Commission had before it the simultaneous and mutually-exclusive applications of the petitioner and of WGAR Broadcasting Company, each requesting the same facility. It designated both applications for hearing, "to determine on a comparative basis which, if either, of the applications in this consolidated proceeding should be granted" (R., pp. 12, 14). These orders were entered February 1, 1946, as required by the ruling in the *Ashbacker* case, *supra*, which had been handed down by this Court on December 3, 1945. A complete, comparative hearing was held. On October 8, 1946, the Commission handed down a proposed decision which discussed the two applicants upon a comparative basis (R., pp. 82 ff.). The extent of the comparison is shown by the following factors

which were considered and discussed as among the grounds for the proposed decision:

> —local residence, as favoring the petitioner (R., p. 97).
>
> —the overlap of the proposed service of WGAR with that of another station, under common ownership, this also favoring the petitioner (R., p. 97).
>
> —the preoccupation of the petitioner's programs with those of network origin to the exclusion of locally-originated programs (R., pp. 97-98).

However, this proposed decision was not adhered to. The final decision, published June 10, 1947, is entirely different in treatment (R., pp. 120 ff.). The final decision holds that the petitioner's program-structure predictions entirely disqualify his application from consideration. The application was accordingly denied without any comparison with that of WGAR Broadcasting Company. And the application of WGAR Broadcasting Company was granted without any comparison with that of the petitioner. The effect of this type of procedure is to make the WGAR grant an *ex parte* one so far as concerns the petitioner, but to deny the application of the petitioner on entirely separate consideration of only that portion of the record made by him. Otherwise put, the Commission by calling for a comparative hearing and then ignoring it in the decision, accomplished the very thing this Court had condemned in the *Ashbacker* case. By merely changing the sequence of events, it still undertook to grant the competing application *ex parte* and to accord the petitioner a nominal hearing.

Conceivably a case might arise wherein one of competing applicants might be disqualified under Section 310(a) of the Act as an alien or a representative of a foreign government or under Section 311 as having been found guilty of an offense under the monopoly laws. Such disqualification would likely render comparative consideration

unnecessary. But such was not the case here. In this case the Commission found the petitioner's program structure objectionable. On that alone it disqualified the petitioner and deprived him of all comparative consideration of his application, making a mere formality of the comparative hearing which had taken place.

A hearing is no hearing if the record made is ignored in the decision. Rather the decision should be based upon consideration of record. cf. *Securities and Exchange Commission* v. *Chenery Corporation,* 317 U. S. 80, pp. 94 ff.

The evil was compounded by the Court's dismissal of the appeal under Section 402(b)(2) of the Act from the grant of the WGAR application. Since the petitioner's own application had been denied, the Court said, he was not aggrieved or adversely affected by the WGAR grant and had no standing to appeal (R., p. 164). Here again there is a rearrangement of the time sequence. If the Commission, as it was required to do, had given the two applications comparative, instead of sequential consideration, the petitioner would be in a position to test the legal validity of the WGAR grant. If he could demonstrate it to be invalid as in direct violation of the Commission's rule against multiple ownership (see R., pp. 31, 32, 37, 78, 108-112), he would then be entitled to a grant of his own application if it is a good, though imperfect application.

If the law be as expounded by the Commission and the Court, then a formula has been developed to avoid the implications of comparative hearing and a way has been found to get around the *Ashbacker* case:

1. Determine which of two competing applications you wish to grant,
2. After hearing, consider the two applications in order, taking up first that which you wish to deny,
3. Find an imperfection to sustain a denial,
4. Grant the remaining application without opinion.

F.

Conclusion.

Wherefore, your petitioner prays that a writ of certiorari be granted under the seal of this Court directed to the United States Court of Appeals for the District of Columbia, and for such further relief as to this Court may seem proper.

Dated this 18th day of August, 1948.

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APPENDIX.

Communications Act of 1934:

Section 326:

Censorship; Indecent Language

Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication. No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.

Section 402(b)(1):

(b) An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(1) By an application for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

Section 402(b)(2):

(b) An appeal may be taken in the manner hereinafter provided, from decisions of the Commission to the Court of Appeals of the District of Columbia in any of the following cases:

(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

NOTICE.

To:

The Solicitor General of the United States,

The General Counsel of the Federal Communications Commission,

Messrs. Kirkland, Fleming, Green, Martin and Ellis, counsel for WGAR Broadcasting Company,

Please note that the foregoing was filed with the clerk of the Supreme Court of the United States on August 18, 1948.

Yours truly,

PAUL M. SEGAL

August 18, 1948

We have received copies this day.

for the Solicitor General

for the General Counsel, F.C.C.

for Kirkland, Fleming, Green, Martin and Ellis

August 18, 1948.